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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 323

SHENANDOAH VALLEY BROADCASTING, INC., *et al.*,

Petitioners,

against

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS,

Respondent.

PETITIONERS' BRIEF OPPOSING RESPONDENT'S PETITION FOR REHEARING

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INDEX

PAGE

PETITIONERS' BRIEF OPPOSING RESPONDENT'S PETITION FOR REHEARING 1

CONCLUSION 9

APPENDIX A, MEMORANDUM OF PLAINTIFF 1a

CITATIONS

Cases:

American Export Lines v. *Revel*, 262 F. 2d 122 (4th Cir.) 3, 7

Blossom v. *Milwaukee & C. Railroad Co.*, 1 Wall. 655 2

Commercial Electrical Supply Co. v. *Curtis*, 288 Fed. 657 (8th Cir.), at pp. 659-60, *cert. denied*, 263 U. S. 709 2

Dickey v. *Turner*, 49 F. 2d 998 (6th Cir.), at p. 1001 2

Division of Labor Law Enforcement v. *Stanley Restaurants, Inc.*, 228 F. 2d 420, at p. 423 (9th Cir.) 3, 7

Drummond v. *United States*, 324 U. S. 316 at p. 318 7

East v. *Crowdus*, 302 F. 2d 645, 646-647 (8th Cir.) 2, 3, 5, 6, 8

Fishgold v. *Sullivan Drydock & Repair Corp.*, 328 U. S. 275 at pp. 281-82 7

Goldlawr, Inc. v. *Heiman*, 273 F. 2d 729 at p. 731 (2d Cir. 1959) 9

Gully v. *Interstate Natural Gas Co.*, 292 U. S. 16 at p. 19 8

PAGE

Hume v. *City of New York*, 255 Fed. 488 (2d Cir.), 491, *cert. denied*, 249 U. S. 603 2

Julian v. *Central Trust Co.*, 193 U. S. 93, 111-13 2

Langnes v. *Green*, 282 U. S. 531 1

Minnesota Co. v. *St. Paul Co.*, 2 Wall. 609, 632-33 2

Oklahoma Gas & Electric Co. v. *Oklahoma Packing Co.*, 292 U. S. 386 at p. 392 8

Phillips v. *United States*, 312 U. S. 246 at p. 254 8

United States v. *American Railway Express Co.*, 265 U. S. 425, 435 1

United States v. *American Society of Composers, Authors and Publishers*, ... 3, 4fn

United States for the use of Browne & Bryan Lumber Co. v. *Massachusetts Bonding and Insurance Co.*, 29 F. R. D. 162 (E. D. N. Y.) 7

United States v. *New York, New Haven and Hartford Railway Co.*, 276 F. 2d 525, 544-45 (2d Cir. 1960), *cert. denied*, 362 U. S. 961 9

Virginia Land Co. v. *Miami Shipbuilding Corp.*, 201 F. 2d 506 (5th Cir.) 7, 8

Walling v. *Reuter Co.*, 321 U. S. 671 at pp. 676-678 8

Statutes:

Federal Rules of Civil Procedure, Rule 73(a) 2, 5, 7

28 U. S. C. §2107 ..... 2, 5, 7

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Respondent.

PETITIONERS' BRIEF OPPOSING RESPONDENT'S PETITION FOR REHEARING

Respondent's petition for rehearing should be denied because it is based on the same contention that respondent previously advanced in opposing petitioners' application for a writ of certiorari. At that time respondent contended, as an alternative ground for sustaining the Court of Appeals' dismissal of petitioners' appeal to that court, that petitioners' notice of appeal was untimely (Respondent's Brief in Opposition to Petition for Certiorari, p. 8). In reversing the Court of Appeals and directing it to hear petitioners' appeal on the merits, this Court of necessity passed on and rejected this contention (*Langnes v. Green*, 282 U. S. 531; *United States* v. *American Railway Express Co.*, 265 U. S. 425, 435). Respondent's petition for rehearing is not based on intervening circumstances of substantial or controlling effect, or on a point not previously presented

to this Court, the only grounds for rehearing available under Rule 58(2) of this Court, but is simply an effort to reargue the merits of this Court's decision.

This Court's previous rejection of respondent's contention was plainly correct. This Court has described the proceedings below as "ancillary" to the United States' action against respondent. Being ancillary, the proceedings on petitioners' application were a continuation of the original suit brought by the United States; petitioners became parties to the original suit for the purpose of asserting their rights under the decree in that suit, and jurisdiction, even of the District Court, depended (in this case necessarily so, since the particular rights asserted by petitioners were created by the Consent Decree) upon its jurisdiction in the original suit. *Blossom* v. *Milwaukee & C. Railroad Co.*, 1 Wall. 655; *Minnesota Co.* v. *St. Paul Co.*, 2 Wall. 609 (and see especially pp. 632-33); *Julian* v. *Central Trust Co.*, 193 U. S. 93 at pp. 111-13; *East* v. *Crowdus*, 302 F. 2d 645, at pp. 646-647 (8th Cir.); *Hume* v. *City of New York*, 255 Fed. 488 (2d Cir.), at p. 491, *cert. denied*, 249 U. S. 603; *Dickey* v. *Turner*, 49 F. 2d 998 (6th Cir.), at p. 1001; *Commercial Electrical Supply Co.* v. *Curtis*, 288 Fed. 657 (8th Cir.), at pp. 659-60, *cert. denied*, 263 U. S. 709.

28 U. S. C. §2107 and Rule 73(a) of the Federal Rules of Civil Procedure provide that in any action, suit or proceeding in which the United States, or an officer or agency thereof, is a party, *all* the parties have 60 days from the entry of judgment to file a notice of appeal. Under the statute and Rule 73(a), the only requirement for the 60-day period to become applicable in ancillary proceedings is

that the United States continue to be a party to the original proceedings before the district court. *East* v. *Crowdus*, 302 F. 2d 645, at pp. 646-647 (8th Cir.); cf. *American Export Lines* v. *Revel*, 262 F. 2d 122 (4th Cir.); cf. also *Division of Labor Law Enforcement* v. *Stanley Restaurants, Inc.*, 228 F. 2d 420, at p. 423 (9th Cir.). This precise question was decided by the Court of Appeals for the Eighth Circuit in *East* v. *Crowdus*, 302 F. 2d 645, where the court concluded that the petitioner, in a proceeding ancillary to an action brought by the SEC, had 60 days to appeal from the district court's dismissal of his petition (302 F. 2d at pp. 646-647). As long as the United States continues as a party to the original proceeding it continues to have an interest and right to be heard in the ancillary proceeding, and a right to appeal to the Court of Appeals from a final order entered therein.

The requirement that the United States continue as a party to the original proceedings is met here. Petitioners did not proceed against respondent by way of a separate lawsuit, but upon motion made by petitioners "at the foot of the ASCAP final judgment" (R. 46a)[1] in *United States* v. *American Society of Composers, Authors and Publishers*, Civil Action No. 13-95. The Court of Appeals found that the proceedings on petitioners' application were "all conducted under the title of the original anti-trust suit" (Appendix to Petition for Writ of Certiorari, p. B3). The Court of Appeals further pointed out that "the judgment here sought to be appealed from was entered in 'a civil

[1] Page references prefixed by the symbol "R." refer to petitioners' appendix filed in the Court of Appeals for the second Circuit, which is Volume 1 of the record herein.

action brought in [a] District Court of the United States' under the Sherman Act 'wherein the United States is complainant'" (*id.*, p. B5).

The United States actively participated in the proceedings before the district court on petitioners' application. Government counsel appeared before the district court in the proceedings on petitioners' application and advised the court that "we are here as the plaintiff in the original suit" (R. 147a).* Both oral argument and written briefs** were submitted on behalf of the United States on the issue of the district court's power to grant the type of license requested by petitioners (R. 153a). In its opinion the district court pointed out that the United States supported petitioners' application and then rejected the United States' view in favor of the respondents' (Appendix to Petition for Writ of Certiorari, p. C2). The United States also actively participated in petitioners' appeal to the Court of Appeals, where the United States supported respondent's position that the only appeal from the judgment of the district court was directly to this Court under the Expediting Act, and submitted both oral argument and a lengthy brief to the court. In this case, the issue before the District Court—namely, whether the Consent Decree was intended to protect those dealing with ASCAP against future abuses of

* To assure that the Government receives adequate notice of all such proceedings, the decree in *United States* v. *American Society of Composers, Authors and Publishers* specifically provides that ASCAP shall, upon the filing of an application, "promptly give notice thereof to the Attorney General" (35a).

** A copy of one of two briefs submitted by the Government, entitled *"Memorandum of Plaintiff,"* is annexed to this brief as Appendix A.

monopolistic power in respect of all license terms, or solely in respect of price—was of deep interest to the United States. Thus the present case is even stronger than *East* v. *Crowdus*, 302 F. 2d 645, for in that case the SEC took no active part in the ancillary proceedings, while here the United States did take an active part in the proceedings on petitioners' application.

The fact that an order entered in an ancillary proceeding is not directly appealable under the Expediting Act does not affect the applicability of 28 U. S. C. §2107, and of Rule 73(a), to the present case, since the language and objectives of these statutes differ. An ancillary order is not appealable under the Expediting Act because the order, unlike one in the original proceeding, does not necessarily affect the final judgment. The United States, however, continues as a party within the meaning of 28 U. S. C. §2107 and Rule 73(a) because it has an interest and right to be heard in an ancillary proceeding which affects the construction of the judgment, and since an order construing the judgment would be *res adjudicata* as to all the parties to the judgment, including the United States, the United States must have a right to appeal therefrom to the Court of Appeals.

Literally, the Expediting Act provides for a direct appeal to this Court only from the final judgment in a suit under the antitrust laws in which the United States is the complainant. This carries with it, of course, direct appellate jurisdiction of appeals from other final orders in the cause which necessarily and directly affect the final judgment. By its earlier decision in this case, this Court has determined that since a final order in an ancillary proceed-

ing granting or denying to a beneficiary relief specifically created by the decree will not necessarily affect the final judgment but on the contrary will in many cases merely serve to resolve an essentially private controversy by applying the provisions of the decree to a particular factual situation, appeals in such cases should take the normal appellate route via the Courts of Appeal.

It by no means follows, however, that the United States, whose decree is in fact involved, was not properly a party to the proceeding below (in which, as we pointed out earlier, it took an active role), and there is nothing in the opinion of the Court in this case to suggest that the Court meant to rule otherwise.

The contention that respondent makes here rests on the unstated assumptions, as the Eighth Circuit Court of Appeals pointed out in *East* v. *Crowdus*, 302 F. 2d 645, at pp. 646-7, that (i) although the Government actively participated in the proceedings before the District Court, involving the proper interpretation of its antitrust consent decree, it actually had no right to be heard therein, and (ii) that even after having so participated, the Government could not have taken an appeal from the decision of the district court expressly rejecting the Government's proposed construction. Since the Government here actively participated in the proceedings before the district court, there can be no serious question but that under well-established principles of law the construction of the decree adopted by the district court became *res adjudicata* as to it and, therefore, all other considerations aside, the Government could in this case have taken an appeal if it so desired, albeit to the Court of Appeals rather than to this

Court.* *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U. S. 275 at pp. 281-282; see, also, *Drummond* v. *United States*, 324 U. S. 316 at p. 318. Accordingly, 28 U. S. C. §2107 and Rule 73(a) give to the United States, and therefore by their express terms and as a matter of common fairness to all other parties, the longer period of sixty days in which to determine whether or not an appeal should be taken.

The facts in *Virginia Land Co.* v. *Miami Shipbuilding Corp.*, 201 F. 2d 506 (5th Cir.), relied on by respondent, are entirely different. In that case the Government's money claim had been settled and the Government had no further interest in any aspect of the suit whatever. Moreover, the quotation from the court's opinion relied on by respondent at page 3 of its brief is dictum, since the court went on to rule that the appeal should be dismissed for lack of finality in the order appealed from (201 F. 2d at p. 508). The suggestion of the court that the applicability of the 60-day provision turns on the issues presented on the appeal has been rejected by all courts that have subsequently considered the point. *Division of Labor Law Enforcement* v. *Stanley Restaurants, Inc.*, 228 F. 2d 420, at p. 423 (9th Cir.); *American Export Lines* v. *Revel*, 262 F. 2d 122, at p. 126 (4th Cir.); *United States for the use of Browne & Bryan Lumber Co.* v. *Massachusetts Bonding and Insurance Co.*, 29 F. R. D. 162 (E. D. N. Y.).

In any event, no reason appears for remanding this case to the Court of Appeals for further consideration of this jurisdictional question. If the case of *Virginia Land*

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* See also Petitioners' Reply To Respondent's Brief Opposing Certiorari, p. 2.

Co. v. *Miami Shipbuilding Corp.*, 201 F. 2d 506 (5th Cir.), relied on by respondent, stands for the proposition for which respondent cites it (with which we do not agree), then that case is in conflict with the decisions of the courts in other circuits, notably the decision of the Eighth Circuit in *East* v. *Crowdus*, 302 F. 2d 645, and such a conflict can only be resolved by this Court. Respondent claims to find support for its position in certain language of this Court's *per curiam* opinion. Remanding the case to the Court of Appeals for an interpretation of this Court's opinion would be a meaningless gesture. If this Court is not inclined to dispose of respondent's contention without further briefs and arguments, we respectfully submit that the Court set the case down for argument.

In the event that this Court should decide that petitioners' notice of appeal was not timely, we respectfully suggest that the circumstances here warrant adoption of the procedure frequently followed by this Court in the exercise of its general appellate supervisory power, and on occasion by the Courts of Appeal, where a party has mistakenly taken an appeal to a court lacking jurisdiction and where (as here) the question of appellate jurisdiction was not definitely settled at the time of the appeal, by directing the entry of a fresh decree in the district court from which a timely appeal pursuant to the appropriate appellate procedure may be taken. *Walling* v. *Reuter Co.*, 321 U. S. 671 at pp. 676-678; *Gully* v. *Interstate Natural Gas Co.*, 292 U. S. 16 at p. 19; *Oklahoma Gas & Electric Co.* v. *Oklahoma Packing Co.*, 292 U. S. 386 at p. 392; *Phillips* v. *United States*, 312 U. S. 246 at p. 254. This result could be accomplished by this Court, in its mandate, directing the Court of Appeals to remand the cause to the district court

for proceedings accordingly, or by directing the district court to enter such a new decree. *United States* v. *New York, New Haven and Hartford Railway Co.*, 276 F. 2d 525, 544-45 (2d Cir. 1960), *cert. denied*, 362 U. S. 961; see also *Goldlawr, Inc.* v. *Heiman*, 273 F. 2d 729 at p. 731 (2d Cir. 1959).

CONCLUSION

The Court of Appeals has already implicitly rejected respondent's contention that petitioners' notice of appeal was untimely by its determination that the United States was a party to the proceedings below. This finding was implicitly confirmed by this Court, which recognized that the present proceedings were ancillary to the United States' action against the respondent. There is no basis, therefore, for respondent's contention that this case should be remanded to the Court of Appeals for further consideration of this question. The only remaining unresolved issues are as to the merits of the case.

For the reasons stated, respondent's petition for rehearing should be denied.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 13-95

UNITED STATES OF AMERICA,

Plaintiff,

against

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, et al.,

Defendants.

In the Matter of the Application of

SHENANDOAH VALLEY BROADCASTING, INC., et al.,

Petitioners,

For the Determination of Reasonable License Fees.

Memorandum of Plaintiff

Petitioners have applied under Section IX of the judgment herein of March 14, 1950 for determination of the reasonableness of fees for those licenses which they have requested to play any composition in the ASCAP repertory on all programs originated by each of the petitioner's local

television stations, and all locally performed filmed or taped programs produced by others prior to February 28, 1962. ASCAP has not quoted a fee for the particular type of license requested. These comments are submitted by the plaintiff as the representative of the public interest in this proceeding.

At this stage of this proceeding, it appears that the issue posed by the application involves not only the reasonableness of the fees for the licenses involved, but also the obligation of the defendant, ASCAP, to issue the type of licenses requested. We believe that we do not have any particular, special competence to advise the Court concerning the reasonableness of the particular license rate proposed by the petitioners. We are, however, concerned with a possible construction of this judgment which limits the right of users of compositions of music, who as a practical matter, must have access to the ASCAP repertory, to a form of a license dictated by ASCAP. It is as to this latter point that we would like to make these initial comments.

Petitioners seek non-exclusive, five year licenses covering all the compositions in the ASCAP repertory granting the right to use such compositions on locally produced programs or on films or tapes produced before February 28, 1962. The request does not include licenses for the right to perform ASCAP compositions on network originated programs and on filmed or taped programs which were produced by others after the specified date (or some other appropriate date). It appears obvious to the plaintiff that the petitioners seek to create an economic vacuum which will force the film and tape producers concerned to obtain

licenses from either ASCAP members (at the same time they acquire synchronization rights) or from ASCAP itself covering performance rights for music contained in the tapes and films.

Plaintiff understands that ASCAP contends that the petitioners do not have a right to such a license under the judgment; that the judgment enumerates the types of licenses which ASCAP must grant, such as per program license or licenses to program producers under Section V (B); and that this is definitive of the licenses which must be issued. Further, ASCAP seems to claim that the licenses in effect protect the right of a broadcaster to obtain clearance at the source and benefit thereby. He may take a per program license. He need not pay a fee for programs the ASCAP music in which is licensed by an ASCAP member or which is licensed at the source by ASCAP under Section V of the judgment.

Plaintiff believes that the antitrust objectives of the 1950 judgment entered in this case require a construction which permits a broadcaster, who of necessity must have access to the thousands of compositions which ASCAP is authorized to license, a realistic, reasonable license to perform all the compositions in the ASCAP repertory. Stated another way, we believe that ASCAP should not be permitted, by limiting the types of licenses which it offers, to frustrate and render null the mandate of Section VI of the judgment that ASCAP "grant to any user making written application therefor a non-exclusive license to perform all of the compositions in the ASCAP repertory," so long as the applicant is requesting a reasonable type of license.

We know that Section IX of the 1950 judgment speaks in terms of the Court determining the reasonableness of the "fee" for a license, but it also specifies that it is the "fee" which ASCAP deems reasonable "for the license requested." It is the strong belief of the plaintiff that reference in Section IX to determination of the "fee" does not foreclose this Court from reviewing the terms and conditions of the license requested and, looking at the objectives of the judgment as a whole, determining whether ASCAP by refusing to advise the petitioners of the fee which it considers reasonable for the licenses requested is, in effect, refusing to comply with the requirements of Sections VI and IX.

It is fundamental to the antitrust considerations in this case and these proceedings that while ASCAP is legally the non-exclusive licensing agency for the performance rights of compositions of thousands of publishers and writers, it is a fact that petitioners must have licenses from ASCAP to use all of the compositions in the ASCAP repertory since it is not practical for them to obtain such licenses from individual owners of the copyrights involved. Thus, to say that the order of the 1950 judgment in Section VI leaves ASCAP free to dictate to an applicant a form of license covering the performance of ASCAP compositions on programs, at places or at times not desired by the applicant, permits ASCAP to exercise a power that comes not from a single copyright owner but from the amassing of so many copyrights.

We believe that the effect of the combined terms and objectives of Sections VI and IX of this Court's 1950 judg-

ment both permits and requires that ASCAP be ordered to advise the petitioners of the fee which it considers reasonable for the licenses requested, that the petitioners be entitled to a reasonable license which gives them the right to perform all of the compositions in the ASCAP repertory, all upon terms and conditions which this Court deems reasonable and in furtherance of the antitrust objectives of this case.

Respectfully submitted,

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Attorney, Department of Justice

January 17, 1962

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